

TAB C

John C. McCullough

05/19/2005

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UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

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CASAS, BENJAMIN & WHITE, LLC,

Plaintiff,

v.

Case No.: 04-CV-1233-MEL

THE POINTE GROUP, INC., a

Massachusetts corporation d/b/a The Pointe

Group Healthcare and Senior Living, GERALD S. FREID,

BARRY, FREID, and KEY CORPORATE CAPITAL, INC.,

Defendants.

- - - - - x

DEPOSITION OF JOHN C. MCCULLOUGH

May 19, 2005

9:24 a.m.

Conn Kavanaugh Rosenthal Peisch & Ford, LLP

Ten Post Office Square

Boston, Massachusetts 02109

Reporter: Carol A. Pagliaro, CSR/RPR/RMR

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A P P E A R A N C E S:

CONN KAVANAUGH ROSENTHAL PEISCH & FORD, LLP

By Erin K. Higgins, Esq.

Ten Post Office Square

Boston, Massachusetts 02109

617-482-8200

Counsel for the Plaintiff

NIXON PEABODY, LLP

By Courtney Worcester, Esq.

889 Elm Street

Manchester, New Hampshire 03101

603-628-4000

Counsel for the Defendant

Key Corporate Capital, Inc.

GORDON HALEY LLP

By Stephen F. Gordon, Esq.

101 Federal Street

Boston, Massachusetts 02110

617-261-0100

Counsel for the witness and Defendants

The Pointe Groupe, Inc., Gerald S. Freid,

and Barry Freid

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EXAMINATION OF:

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By Atty. Higgins

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By Atty. Worcester

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NO.

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49 12/23/03 letter from Kauffman to

13:13:01

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McCullough

20

13:13:31

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50 6/3/2004 e-mail from Gordon to Kauffman

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51 9/25/04 e-mail from Gordon to Sucoff and

13:13:52

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52 9/27/04 e-mail from McCullough to Cole

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53 9/27/04 package of wiring instructions

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54 9/29/04 e-mail from McCullough to Gordon

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55 9/29/04 e-mail from Caine to Cole

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56 9/27/04 draft of Closing Statement

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57 9/30/04 8:20 a.m. Draft of Closing

13:15:00

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58 9/30/04 8:37 a.m. Draft of Closing

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P R O C E E D I N G S

Stipulation

It is stipulated by and between counsel for the respective parties that Motions to Strike and all objections, except as to form, are reserved until the time of trial. It is further stipulated that the witness may sign the deposition under the pains and penalties of perjury, rather than before a notary public.

JOHN C. McCULLOUGH,
a witness called on behalf of the Plaintiff, having first been duly sworn, was deposed and testified as follows:

DIRECT EXAMINATION

BY ATTY. HIGGINS:

Q. Sir, could you state your full name for the record?

A. Yes, John McCullough, M-c-C-u-l-l-o-u-g-h.

ATTY. HIGGINS: Mr. McCullough, I represent the plaintiff in this, Casas, Benjamin & White. Have you ever had your deposition taken before?

A. I can't recall if I have.

Q. I know you are a transactional lawyer,

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09:25:19 1

correct?

09:25:20 2

A. Yes.

09:25:21 3

Q. Have you ever sat in on deposition?

09:25:21 4

A. Yes.

09:25:23 5

Q. So you are generally aware of the rules, but

09:25:25 6

I'll just tell you a few that sometimes it's hard

09:25:28 7

for people who are actually giving depositions to

09:25:32 8

remember. Most important is you need to let me

09:25:34 9

finish my question before you start answering, even

09:25:37 10

though, like most attorneys, you are going to think

09:25:39 11

you know what my question is, so the court reporter

09:25:41 12

can take down my question and your answer without us

09:25:44 13

talking over one another.

09:25:45 14

If you don't understand a question I'm

09:25:47 15

asking you, please let me know, and I'll try too

09:25:49 16

rephrase it.

09:25:50 17

If you need to take a break, let me

09:25:52 18

know. We can do that as long as it's not in the

09:25:55 19

middle of a pending question.

09:25:57 20

And that's about it.

09:25:59 21

Are you taking any medications today

09:26:01 22

that would affect your ability to answer my

09:26:04 23

questions?

09:26:05 24

A. No.

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09:26:06 1 Q. I'm not going to go through a huge litany,
09:26:10 2 but could you just briefly tell me your educational
09:26:12 3 background and where you have worked in the last 20
09:26:14 4 year?

09:26:15 5 A. I went to law school.

09:26:16 6 Q. Where did you go to law school?

09:26:17 7 A. BC Law.

09:26:17 8 Q. When did you graduate?

09:26:19 9 A. 1966.

09:26:22 10 Q. And where have you worked during the past
09:26:25 11 ten years.

09:26:26 12 A. McCullough, Stievater & Polvere, 121 Main
09:26:31 13 Street, Charlestown.

09:26:31 14 Q. And that's a firm you founded?

09:26:33 15 A. Yes.

09:26:34 16 Q. What year did you found the firm?

09:26:36 17 A. 1972.

09:26:37 18 Q. And you have worked there ever since?

09:26:39 19 A. Yes.

09:26:40 20 Q. Can you just describe for me generally your
09:26:42 21 areas of practice?

09:26:44 22 A. Currently the areas of practice are project
09:26:47 23 developments, affordable housing, extensive nursing
09:26:51 24 home representation, management, sales, HUD closing,

11:22:08 1 outside of closing. It's a typical standard
11:22:08 2 reference.

11:22:08 3 Q. What was Andy Sucoff's response to that?

11:22:09 4 A. He didn't have any response. I just said we
11:22:11 5 are going to deal with it outside of closing, and he
11:22:13 6 adjusted the -- he would make the adjustment he
11:22:17 7 said. We were going over many other issues at the
11:22:22 8 same time.

11:22:22 9 Q. And before you told Mr. Sucoff that -- well,
11:22:27 10 let me ask this question, when you told Mr. Sucoff
11:22:30 11 that we would deal with the broker commission out of
11:22:33 12 the closing, who were you referring to?

11:22:35 13 A. The sellers.

11:23:10 14 (Court Reporter changes paper.)

11:23:18 15 Q. Before you told Mr. Sucoff that the sellers
11:23:22 16 would deal with the broker commission outside of the
11:23:24 17 closing, did you have any conversations with anyone
11:23:27 18 at Casas, Benjamin & White as to whether that was
11:23:30 19 acceptable to Casas, Benjamin & White?

11:23:32 20 A. I did not.

11:23:33 21 Q. Did anyone tell you that they had had such a
11:23:36 22 conversation with anyone at Casas, Benjamin & White?

11:23:44 23 A. I don't recall if anybody told me that.

11:23:48 24 Q. Prior to telling Mr. Sucoff that the sellers

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11:23:51 1 would deal with the broker commission outside of the
11:23:54 2 closing, had you, without revealing the substance of
11:23:58 3 any communications, had you spoken with anyone
11:24:03 4 affiliated with the sellers about that issue?

11:24:03 5 ATTY. GORDON: Just yes or no.

11:24:14 6 A. Yes.

11:24:15 7 Q. And, again, without revealing the substance
11:24:17 8 of any such communications, before telling Mr.
11:24:22 9 Sucoff that the sellers would deal with the broker
11:24:25 10 commission outside of the closing, had you discussed
11:24:28 11 that issue with Barry Freid?

11:24:30 12 ATTY. GORDON: I'm going to instruct the
11:24:32 13 witness not to answer that question.

11:24:34 14 ATTY. HIGGINS: It's a yes-or-no
11:24:34 15 question.

11:24:34 16 ATTY. GORDON: I understand that. I'm
11:24:35 17 going to instruct him not to answer the question.

11:24:39 18 ATTY. HIGGINS: And on what, just to
11:24:39 19 make sure for the record?

11:24:40 20 ATTY. GORDON: On the grounds of
11:24:41 21 privilege.

11:24:42 22 Q. All right, I'm going to ask a similar
11:24:44 23 question. Prior to telling Mr. Sucoff that the
11:24:50 24 sellers would deal with the broker's commission

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11:24:53 1 outside of the closing, again without revealing the
11:24:56 2 substance of any communications, had you discussed
11:25:01 3 that issue with Gerald Freid?

11:25:03 4 ATTY. GORDON: I'm going to instruct the
11:25:03 5 witness not to answer the question on the grounds
11:25:06 6 of privilege.

11:25:07 7 ATTY. HIGGINS: I'll object to that
11:25:08 8 instruction.

11:25:12 9 Q. Mr. McCullough, prior to telling Mr. Sucoff
11:25:14 10 that you would deal with the broker commission
11:25:18 11 outside of the closing, had you discussed that issue
11:25:22 12 with Mark Tobin?

11:25:23 13 ATTY. GORDON: I'm going to instruct the
11:25:24 14 witness not to answer that question on the grounds
11:25:27 15 of privilege.

11:25:31 16 Q. Had you discussed the issue -- let me start
11:25:34 17 again. Prior to telling Mr. Sucoff that the sellers
11:25:38 18 would deal with the broker commission outside of the
11:25:41 19 closing, had you discussed that issue with Mr.
11:25:43 20 Gordon?

11:25:44 21 ATTY. GORDON: I'm going to instruct the
11:25:46 22 witness not to answer that question on the grounds
11:25:47 23 of privilege.

11:25:50 24 Q. Mr. McCullough, had you discussed that

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11:25:52 1 issue, the issue that I have just been talking
11:25:54 2 about? Had you discussed that issue, again without
11:25:57 3 telling me the substance of such communications,
11:26:00 4 with Georgia Freid?

11:26:01 5 ATTY. GORDON: I'm going to instruct the
11:26:02 6 witness not to answer the question on the grounds of
11:26:05 7 privilege.

11:26:26 8 Q. Let me just try it a slightly different way.
11:26:31 9 Mr. McCullough, prior to telling Mr. Sucoff that the
11:26:36 10 sellers would deal with the broker commission
11:26:38 11 outside of the closing, had anyone affiliated with
11:26:41 12 The Pointe Group authorized you to make that
11:26:45 13 communication to Mr. Sucoff?

11:26:47 14 ATTY. GORDON: I'm going to instruct the
11:26:48 15 witness not to answer that question on the grounds
11:26:52 16 of privilege.

11:26:54 17 ATTY. HIGGINS: Even though my question
11:26:55 18 regards a communication that was to be made to a
11:26:59 19 third party?

11:27:01 20 ATTY. GORDON: My instruction stands.

11:27:01 21 ATTY. WORCESTER: Could you read back
11:27:33 22 Erin's last question.

11:27:33 23 (Question read.)

11:27:45 24 ATTY. HIGGINS: Let's go off the record

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11:28:51 1 for a second.

11:28:51 2 (Discussion off the record.)

11:28:53 3 ATTY. HIGGINS: I just want the record
11:28:55 4 to reflect that while we were off the record counsel
11:28:58 5 discussed whether to suspend Mr. McCullough's
11:29:01 6 deposition now for the purpose of obtaining the
11:29:04 7 judge's ruling on whether Mr. McCullough should be
11:29:07 8 required to answer questions, the questions that I
11:29:10 9 just posed to Mr. McCullough, whether we would
11:29:14 10 suspend his deposition at the end of today, then
11:29:19 11 seek the judge's ruling on whether he should be
11:29:21 12 required to answer those questions, which might
11:29:24 13 entail Mr. McCullough coming back for a subsequent
11:29:27 14 deposition to answer questions as the judge directs,
11:29:31 15 and I just want to make it clear for the record that
11:29:33 16 I'm reserving my right to do that.

11:29:35 17 ATTY. GORDON: And we have agreed to do
11:29:36 18 that.

11:29:46 19 Q. Getting back to the closing itself, do you
11:29:49 20 recall who was present at Goodwin's offices that day
11:29:54 21 from The Pointe Group side of things?

11:30:03 22 A. Yes, there were a number of people, Mark
11:30:07 23 Tobin, Jerry Freid, Barry Freid, Steve Gordon, Frank
11:30:13 24 Barker, Mary Anne Tyler, Mary Cole, myself, and